SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 501

CITY OF DUBUQUE BRIDGE COMMISSION,
Petitioner,

vs.

THE BOARD OF REVIEW FOR THE CITY OF DUBUQUE, JULIEN TOWNSHIP, DUBUQUE COUNTY, IOWA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of the Court Below.

The opinion of the Iowa Supreme Court is reported in 5 N. W. (2) 334, and is found in the record (R. 88-107).

Jurisdictional Grounds.

The grounds of jurisdiction are adequately treated in Jurisdictional Statement in Petition for Writ of Certiorari, *supra*, page 4.

Statement of the Case.

The facts of this case are stated for the most part in the Petition for Writ of Certiorari and with the following additions will be sufficiently adequate:

The members of the Commission are named in the Act of Congress creating the same and vacancies thereon are to be filled by the Federal Works Administrator (R. 22, 23). Congress has reserved the right to alter, amend or repeal the Act (R. 27).

The Commission issued bonds in the sum of $475,000.00 which was used to acquire the old bridge (R. 53). Subsequently the Commission issued bonds in the sum of $2,800,000.00, bearing 3¾% interest, which retired the original bond issue and provided funds for constructing the new bridge (R. 56, 57, 58). Under the Act of Congress these bonds must be paid in thirty years (R. 16).

The State of Iowa is paying $408,000.00 plus some engineering expenses and the State of Illinois is paying $325,000.00 (combined State and Federal Highway Aid) toward the cost of the new bridge (R. 31, 41, 43).

The gross revenue from the bridge for the year ending December 1, 1941, was $188,163.00 (R. 73). The annual cost of operation, maintenance and repair, exclusive of taxes, is estimated by the Commission to be $36,000.00 (R. 56, 57).

The 1940 Illinois real estate consolidated levy in East Dubuque, Illinois, was 44½ mills (R. 29).

Assignment of Errors.

It is submitted that the Supreme Court of Iowa erred in holding:

1. That City of Dubuque Bridge Commission is not a Federal instrumentality.

2. That City of Dubuque Bridge Commission does not exercise governmental functions.

3. That City of Dubuque Bridge Commission is not immune from the Iowa real estate tax by virtue of the implied immunity of Federal instrumentalities from

state taxation under the Constitution of the United States.

4. That City of Dubuque Bridge Commission is not entitled to immunity from Iowa real estate tax because the first Act, passed by a prior Congress, undertaking to create the Commission, was vetoed on account of a tax exemption clause therein, and the Subsequent Act creating the Commission is silent as to tax immunity.

5. That the bridge of City of Dubuque Bridge Commission is not property of the United States.

ARGUMENT.

Points I and II—City of Dubuque Bridge Commission is a Federal instrumentality exercising governmental functions.

The Act of Congress creating City of Dubuque Bridge Commission is a constitutional exercise of governmental power. This is conceded by respondent and the Supreme Court of Iowa (R. 92) and is supported by a decision of the United States Supreme Court. *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 530; 14 S. Ct. 891, 38 L. Ed. 808 (1894). That case held that an Act of Congress which created a corporation and which authorized it to construct a bridge across the Hudson River between the States of New York and New Jersey, to issue bonds, and to secure the same by a mortgage on its property, and to collect tolls, was constitutional.

The Federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. *Graves* v. *People of State of New York*, 306 U. S. 466, 477; 59 S. Ct. 595, 596, 597; 83 L. Ed. 927 (1939); *Federal Land Bank* v. *Bismarck Lumber Co.*, — U. S. —; 62 S. Ct. 1, 5; — L. Ed. — (1941). When Congress constitutionally creates a corporation through which the Federal government lawfully

acts, the activities of such corporation are governmental. *Federal Land Bank* v. *Bismarck Lumber Co.*, supra; *Graves* v. *People of State of New York*, supra; *Pittman* v. *Home Owners Loan Corporation*, 308 U. S. 21, 32; 60 S. Ct. 15, 17; 84 L. Ed. 11 (1939). It, therefore, follows that City of Dubuque Bridge Commission, being constitutionally created, is a Federal instrumentality exercising the governmental functions of providing facilities for interstate commerce in the form of interstate highway bridges which shall be free of toll when their cost is paid.

The Supreme Court of Iowa is in error because it holds that the Commission does not exercise any governmental function (R. 96-97) and holds that the Federal government can lawfully act like the states both in a governmental and proprietary capacity (R. 101) *when in fact the national government can lawfully act only governmentally.* This error is basic and accounts for the Iowa Supreme Court's action in denying tax immunity.

Point III—The City of Dubuque Bridge Commission is immune from the Iowa real estate tax by virtue of the implied immunity of Federal instrumentalities from State taxation under the Constitution of the United States.

Chapters 330 to 349, inclusive, Code of Iowa 1939, as amended, provide for a system of taxing real and personal property in the State of Iowa. Section 6953 (1) of said Chapter 330 provides that toll bridges shall be taxed as real estate, and Section 6956 of said Chapter 331 provides that said property shall be listed by the owner; real estate taxes are a lien on the property assessed (Section 7202, Chapter 346); if the taxes are not paid, the property will be sold for taxes (Chapter 347). Section 7210, Chapter 346, provides as follows:

> "No demand of taxes shall be necessary, but it shall be the duty of every person subject to taxation to at-

tend at the office of the treasurer, at some time between the first Monday in January and the first day of March following, and pay his taxes in full, or one-half thereof before the first day of March succeeding the levy, and the remaining half before the first day of September following."

The Iowa Supreme Court has held that the tax is not in rem, but a debt, a personal obligation of the person taxed. *City of Dubuque* v. *Illinois Central Railroad,* 39 Iowa, 56, 61 (1874); *Findley* v. *Taylor,* 97 Iowa, 420, 422; 66 N. W. 744, 745 (1896). The tax in the case at bar is based on an assessment of a bridge as real estate, but the obligation to pay it is laid directly on the City of Dubuque Bridge Commission.

The Constitutional immunity of a Federal governmental agency from state taxation is implied in the United States Constitution, being a matter of necessity under the Federal system. *McCulloch* v. *Maryland,* 4 Wheaton 316; 4 L. Ed. 579 (1819); *Indian Motorcycle Company* v. *United States,* 283 U. S. 570, 575; 51 S. Ct. 601, 602, 603; 68 L. Ed. 328 (1923); *Clallam County, Washington,* v. *United States,* 263 U. S. 341, 342; 44 S. Ct. 121, 122; 68 L. Ed. 328 (1923). Its limits are set by the limits of lawful governmental operations. *Fox Film Corporation* v. *Dayal,* 286 U. S. 123, 128; 52 S. Ct. 546, 547; 76 L. Ed. 1010 (1932). The immunity applies to governmental corporations as well as to departments of government when the corporation exercises governmental functions. *Graves* v. *People State of New York, supra, Points I and II; Pittman* v. *Home Owners Loan Corporation, supra, Points I and II.*

The City of Dubuque Bridge Commission has constitutional immunity from the tax because it is a Federal instrumentality engaged exclusively in the exercise of governmental functions. The Commission does not and cannot engage in any operations for private profit. The decision

in the instant case should be controlled by the following cases: *Clallam County, Washington,* v. *United States, supra; City of New Brunswick* v. *United States,* 270 U. S. 547, 555; 48 S. Ct. 371, 372; 72 L. Ed. 693 (1928). For lower Federal Court decisions to same effect, see: *United States* v. *Coghlan,* 261 Fed. 425 (1919); *United States Shipping Board Emergency Fleet Corporation* v. *Delaware County, Pennsylvania,* 17 Federal (2) 40 (1927); *King County, Washington,* v. *United States Shipping Board Emergency Fleet Corporation,* 282 Fed. 950 (1922); *United States Spruce Production Corporation* v. *Lincoln County, Oregon,* 285 Fed. 388 (1922). In these cases real estate owned by corporations created by Congress to aid in the prosecution of World War of 1916-1918, was held to be immune from state taxation. The Iowa Supreme Court attempted to distinguish these cases on the basis that the corporations issued stock which was all purchased by the United States Treasury (R. 98-99). This is not a valid distinction because the difference is only in the method of financing. The war corporations were financed by sale of capital stock to the government, the Commission is financed by a bond issue and State and Federal Highway Aid. The important principle is that all were created by Congress to exercise governmental functions exclusively; the war corporations to prosecute the war, the Commission to provide interstate highway bridge or bridges free of toll when their cost is paid. The Commission is government owned as much as any non-stock, non-profit corporation can be owned by any person, for it is subject to Congressional power to alter, amend or repeal its authority. If it is not owned by the government, it is not owned by anyone. The decision of the Iowa Supreme Court is in error because it is contrary to the above cases.

The Commission is constitutionally immune from the tax because the legal incidence of the tax is laid directly on it,

a Federal instrumentality engaged exclusively in the exercise of governmental functions and the property assessed is a bridge which is the very means used to accomplish the governmental purpose.

The basis of the immunity has been stated to depend on whether or not the effect of the tax is to burden or interfere with governmental functions, *Railroad Company* v. *Peniston,* 18 Wall. 5, 36; 21 L. Ed. 787 (1873) being illustrative. The tax is a burden because the obligation to pay it is on the Commission, a Federal instrumentality. It is an interference with governmental functions because it prolongs, if not makes impossible, the accomplishment of the governmental purpose—an interstate highway bridge across the Mississippi River between Dubuque, Iowa, and East Dubuque, Illinois, free of toll as soon as the cost is paid. See petitioner's Application for Writ of Certiorari, *supra,* pages 10 and 11. Assuming the income of the Commission will be sufficient to retire the bonds and pay the tax and assuming that Iowa, its subdivisions or other interests, will not accept the Iowa portion of the new bridge on condition that it will be operated free of toll, who will pay this tax after the bonds are retired? The Commission will then have no income, for its right to collect tolls will cease and it will be charged with the duty of maintaining, operating and repairing the bridge (R. 21). To finance this maintenance, operation and repair will require an appropriation from Congress. *Shall the Commission then also ask Congress to appropriate an amount to pay the Iowa real estate tax?* The present tax is equally repugnant to constitutional principles.

The following cases also support petitioner's claim of tax immunity: *Farmers & Mechanics Savings Bank* v. *Minnesota,* 232 U. S. 516; 34 S. Ct. 354; 58 L. Ed. 706 (1914); *Weston* v. *City Council of Charleston,* 2 Peters 449 (1829); *Panhandle Oil Co.* v. *State of Miss.,* 277 U. S. 218; 48 S.

Ct. 451, 452; — L. Ed. 257 (1928); *Western Union Telegraph Co.* v. *Texas,* 105 U. S. 460; 26 L. Ed. 1067 (1881).

Point IV—City of Dubuque Bridge Commission is not deprived of immunity from Iowa real estate tax because of Congressional silence as to immunity after Presidential veto of expressed immunity.

The fact that the President vetoed an Act of the 75th Congress which undertook to create the Commission and to give it an expressed grant of the immunity, we believe is immaterial because the Commission is acting under an Act passed by the 76th Congress and approved by the President. Whether or not these circumstances show a waiver of implied constitutional immunity clearly raises a federal question.

There is no waiver of immunity by reason of Congressional silence. *Graves* v. *People of State of New York,* 306 U. S. 460; 59 S. Ct. 595, 598; 83 L. Ed. 927 (1939). Silence of Congress leaves the question of immunity to be determined as a constitutional question. *Graves* v. *People of State of New York, supra.* Petitioner believes the Supreme Court of Iowa erred in denying immunity because of Congressional silence following Presidential veto of immunity.

The veto was an expression of Presidential opinion, not Congressional. Congress intended immunity in the first Act and by remaining silent in the second it left the question open as a constitutional question, because it did not expressly consent to state taxation.

Congress had three alternatives: (1) to expressly grant immunity, (2) to expressly provide for state taxation, (3) or to be silent and leave the question of taxation by the state to be determined by judicial application of constitutional principles. If there had been only two alternatives, the rejection of one would be an intention of the other, but when there are three alternatives, to imply the adoption of one of two solely because of a rejection of the third, is

rash speculation. In this case, Congress is neutral as to immunity, and its existence or non-existence must be determined by constitutional principles.

In so far as Congress acted on this subject, its action is more consistent with granting the immunity if it exists under the Constitution than with denying it because of Congressional silence.

Point V—The Commission's bridge is property of the United States.

Section 6944 (1), Code of Iowa, 1939, exempts property "of the United States" from taxation. The Iowa Supreme Court conceded petitioner's "assertion that the fact that legal title is not in the name of United States of America does not disqualify the bridge from exemption may be granted" (R. 104). Supporting this proposition see *United States Spruce Corp.* v. *Lincoln County,* 285 Fed. 388, 391 (1922); *King County* v. *United States Shipping Board Emergency Fleet Corp.,* 282 Fed. 950, 953; *Commonwealth* v. *Newport & Covington Bridge Co.,* 32 Ky. L. 196; 105 S. W. 378, 379 (1907).

We do not ask the Supreme Court of the United States to construe the Iowa statute of exemption, for that is clearly in the exclusive province of the Iowa Supreme Court. We do ask this Court, however, to correct an erroneous conclusion as to United States constitutional law made by the Iowa Supreme Court which was used as a basis for construing the Iowa statute. *State Tax Commission of Utah* v. *Van Cott,* 306 U. S. 511, 514; 59 S. Ct. 605, 606; 83 L. Ed. 950 (1939); *Abie State Bank* v. *Bryon,* 282 U. S. 765, 773; 51 S. Ct. 252, 255; 75 L. Ed. 690 (1930).

It is apparent from the language of the Iowa Court that it held that the bridge was not property of the United States because it concluded the Commission was not a Federal instrumentality and did not exercise any governmental functions (R. 104-105). It also erroneously held that the Com-

Standard Oil Co. of Calif. v. Johnson, 62 Sup. Ct. 1168, 1169 (June 1, 1942)

mission was not a Federal instrumentality because it did not have capital stock owned by the United States Treasury (R. 99). For correction of these conclusions see Points I, II and III hereof.

The correction of these erroneous conceptions of Federal law will be very important if immunity should be denied because of Congressional silence which is discussed in Point IV, *supra.*

Summary of Argument.

I and II.

City of Dubuque Bridge Commission is a Federal instrumentality exercising governmental functions.

III.

The City of Dubuque Bridge Commission is immune from the Iowa real estate tax by virtue of the implied immunity of Federal instrumentalities from state taxation under the Constitution of the United States.

IV.

The City of Dubuque Bridge Commission is not deprived of immunity from Iowa real estate tax because of Congressional silence as to immunity after Presidential veto of expressed immunity.

V.

The Commission's bridge is property of the United States.

Respectfully submitted,

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